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DIVISION OF LABOR STANDARDS ENFORCEMENT  
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Arthur S. Lujan  
*Office of the  
State Labor Commissioner*

August 30, 2002

Paul R. Lynd  
Littler Mendelson  
650 California Street, 20th Floor  
San Francisco, CA 94108

FAXED TO: 415-743-6653

Re: Salary Requirements for Exempt Employees

Dear Mr. Lynd:

This in response to your letter dated June 24, 2002, seeking guidance as to certain issues that arise under the requirement to compensate exempt employees on a salary basis. Your first question is whether an employer may shut down operations for a full workweek (seven consecutive days), and not pay its exempt employees any salary for that workweek, without destroying the employees' exempt status. This question was answered by my letter to Bill Dombrowski, dated March 1, 2002. A copy of that letter is attached hereto. In that letter, we concluded that a weekly salary test may be used to meet the California requirements for a monthly salary, so that an employer may deduct a full week of salary from an exempt employee's salary as a consequence of a full week shut down, without jeopardizing the exemption, provided that this deduction does not reduce the monthly salary to an amount below the minimum level required for exempt status under Labor Code §515(a), presently \$2,340. We do not interpret the "monthly salary" language in Labor Code §515 and in the Industrial Welfare Commission ("IWC") wage orders to require that an employer pay an exempt employee his or her full monthly salary if the employee was furloughed for a full workweek during that month.

Your second question is whether, if there is a full week shut down, the employer must allow its exempt employees to use accrued PTO (personal time off) in order to get paid for the week, as each employee may wish. The Division of Labor Standards Enforcement has historically treated PTO in the exact same manner as vacation time, in that PTO can be used by an employee to cover absences for personal reasons. There is no law that would require an employer to allow employees to take vacation or PTO during a week-long shut down. Whether or not the employees have such a right to take

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vacation or PTO on any given week would depend on the employment agreement or policy on the use of accrued vacation or PTO.

Your third question is whether, if no work is available for a full week, the employer may require its exempt employees to use their accrued PTO for that week. Insofar as there is no separate obligation to pay exempt employees for a full week in which no work is available (or performed), the only way such employees would get paid for the week is through the use of vacation or PTO. Presumably, the overwhelming number of such employees would readily agree to use their accrued vacation or PTO in order to get paid. As to whether the employer could require those few employees who might wish to save their accrued vacation or PTO for future use, the question boils down to whether the contract of employment requires those employees to take vacation or PTO time during a specified period of time of the year, such as, for example, the week of Christmas or the week of July 4. If the shut down matches those weeks, then the employer may require use of accrued vacation or PTO for the period of the full week shut down. The Division's historic enforcement policy in regards to employer-mandated usage of vacation or PTO is that if the employer wishes to establish a policy mandating use of already accrued vacation or PTO, the employer must give the employee a minimum of nine months notice prior to the week(s) in which the time must be taken, so as to give the employees the opportunity to use that accrued time when they see fit, subject, of course, to any reasonable restrictions. A policy requiring employees to use their accrued vacation or PTO for any full week during which the employer may shut down, without specifically identifying the week(s) when these shutdowns may take place, would, in our view, run afoul of the requirement of advance notice and unfairly deny employees the opportunity to make choices as to when to take accrued vacation. These policies are founded upon the statutory mandate, at Labor Code §227.3, that the Labor Commissioner "shall apply principles of equity and fairness" with regard to issues concerning vested vacation time.

Your final question is whether an exempt employee who takes a partial day off because of a "light workload" can have his or her PTO deducted for the partial day; and if the employee has no accrued PTO, whether his or her salary can be deducted for the hours not worked. Whether the partial day off is the result of the employee freely choosing to leave work early for personal reasons, or the result of the employer sending the employee home, the answers are the same. In the latter scenario, there can be no deduction from salary for a furlough of less than a full workweek. 29 CFR section 541.118(a)(1) provides: "An employee will not be considered to be 'on a salary basis' if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee is ready, willing, and able to work, deductions may not be made for time

when work is not available." The only exception to this under the federal regulations is that "an employee need not be paid for any workweek in which he performs no work." (29 CFR §541.118(a)) Turning to the scenario in which an employee chooses to take part of a day off when work is available, the federal regulations clearly provide that while deductions from salary may be made for a full day absence for personal reasons, deductions may not be made from salary for a partial day absence for personal reasons. (29 CFR §541.118(a)(2))

Under federal law, an employer can deduct from a vacation or PTO leave bank to cover hours that were taken off during a day for personal reasons or to cover hours that were not worked during a partial week shutdown, under the theory that vacation or PTO is no more than a "benefit", and that the purpose of that benefit is to provide a source of salary when the employee is away from work. However, state law does not permit the deduction of accrued vacation or PTO when the employer already has an independent obligation to pay the exempt employee's salary. The reason that state law operates differently than federal law in this regard is that state law has long treated accrued vacation not as a "benefit", but rather, as *accrued wages that are not subject to forfeiture*. (Labor Code §227.3, *Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal.3d 774.) And if an employer already has a pre-existing obligation to pay full salary to an exempt employee who takes part of a day off for personal reasons, or who is furloughed for part of a week; that obligation cannot be discharged by requiring the employee to use his or her own *accrued wages* to pay his or her salary.

Thank you for your interest in California wage and hour law. Please feel free to contact me with any further questions.

Sincerely,

Arthur S. Lujan  
State Labor Commissioner

ASL/ml

cc: Tom Grogan  
Anne Stevason  
Greg Rupp  
Nance Steffen  
Bridget Bane, IWC Executive Officer

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